88-65

No. __________

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BYRNECE S. GREEN,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES B. LEWIS
Director, Student Tax Clinic
Benjamin N. Cardozo
School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0381

Counsel for Petitioner

QUESTIONS PRESENTED

The Petitioner recovered $900,000 in a suit in *quantum meruit* against the estate of her deceased companion, who had broken his promise to bequeath his estate to her. The questions presented are:

1. Whether money received by a taxpayer, other than as compensation for employment or for property, from the estate of his or her companion is nontaxable under section 102(a) of the Internal Revenue Code as a gift, bequest, devise, or inheritance.

2. Whether, if question 1 is answered affirmatively, money recovered under such circumstances in a suit to enforce the companion's broken promise to bequeath property is similarly nontaxable.

3. Whether the recovery by suit is similarly nontaxable where the suit is in *quantum meruit*.

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COMMISSIONER OF INTERNAL REVENUE,

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The memorandum findings of fact and opinion of the United States Tax Court (Wright, *Judge*) were filed on September 28, 1987, and designated T.C. Memo. 1987-503. They are not officially reported, but are unofficially reported at 54 CCH T.C.M. 764 and at 1987 PH TC Memo ¶ 87,504. Those findings of fact and opinion, with Judge Wright's order dated October 7, 1987, and his decision dated October 24, 1987, are reprinted in Appendix A to this petition.

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit (Cardamone, Pratt, and Mahoney, *Circuit Judges*), affirming the Tax Court, was filed on May 16, 1988. That opinion is not yet officially reported, but is unofficially reported at 88-1 USTC ¶ 9349 and at 61 AFTR 2d 1193. That opinion is reprinted in Appendix B to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 16, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are sections 61 and 102 of the Internal Revenue Code of 1954 (the "Code"), as amended. Those statutes are reprinted in Appendix C to this petition.

STATEMENT OF THE CASE

The facts in this case are not in dispute.

The petitioner met Maxwell Richmond on November 18, 1962. They were both residents of Boston.

The petitioner, then 36 years old, was divorced and had a 15-year old son, Randall, by her former marriage. She worked as a secretary until 1964 and, thereafter, as a stockbroker, earning approximately $20,000 a year. She had no significant monetary assets.

Richmond was a 49-year old bachelor. He owned and operated radio stations. His net worth was approximately $7 million.

The petitioner and Richmond fell in love. About a month after their initial meeting, Richmond proposed marriage and the petitioner accepted. Wedding plans were announced to their families and friends.

In October 1963 Richmond told the petitioner that he had a fear of marriage. He asked her to live with him without marriage; she reluctantly and tearfully accepted. Richmond, as part of their bargain, orally agreed to bequeath his estate to her.

Commencing in October 1963 the petitioner and Richmond maintained a close relationship for the balance of Richmond's life (approximately eight years). They lived, vacationed, and attended family functions together. Although they maintained separate apartments out of concern over Randall's feelings, they had an intimate, marriage-like relationship. Richmond died in the petitioner's arms of a heart attack on October 21, 1971.

After Richmond's death no will was immediately found. Later, in a hotly-disputed proceeding, a one-page paper allegedly signed by Richmond was admitted to probate as his will. That paper left Richmond's estate to his brother and sister and named his brother executor.

The petitioner sued Richmond's estate in *quantum meruit* in the Massachusetts Superior Court for Suffolk County. The jury awarded the petitioner $1,350,000.

Richmond's executor appealed to the Supreme Judicial Court of Massachusetts, which affirmed as to liability but reversed and remanded the case for a new trial limited to the issue of damages. *Green v. Richmond*, 369 Mass. 47, 337 N.E. 2d 691 (1975). That opinion is reprinted in Appendix D to this petition.

Following remand, the petitioner accepted $900,000 in settlement of her suit, payable $139,311.61 in 1977 and $760,688.39 in 1978. After payment of legal fees and disbursements of $305,734.93, the petitioner's net recovery was $594,265.07.

The petitioner disclosed those payments on her 1977 and 1978 federal income tax returns, but claimed that the payments were nontaxable. On audit, the Commissioner of Internal Revenue subjected the net recovery to tax. The Tax Court sustained the Commissioner's action, determining tax deficiencies of $41,709.93 and $253,083.00 for 1977 and 1978, respectively.

The Court of Appeals for the Second Circuit affirmed the Tax Court's decision.

Bills totalling $798,801.66 for those deficiencies plus interest and late payment penalty were mailed to the petitioner by the Internal Revenue Service on June 6, 1988.

REASONS FOR GRANTING THE WRIT

This case should be reviewed by this Court for two reasons:

First, the decisions below leave unsettled a question important to the administration of the Federal income and estate tax laws and to the administration of decedents' estates, namely, the tax treatment of money received by a taxpayer, other than as compensation for employment or for property, from the estate of his or her companion.

Second, the decisions below conflict in principle with the decision of this Court in *Commissioner v. Wemyss*, 324 U.S. 303 (1945), and with the decisions of the United States Tax Court and the United States Court of Appeals for the Third Circuit in *Pascarelli v. Commissioner*, 55 T.C. 1082 (1971), *aff'd without published opinion*, 485 F.2d 681 (3d Cir. 1973).

I

Transfers of money or other property between family members or companions, either during their joint lives or at the transferor's death, are commonly motivated by love and affection. The transfers referred to are those made other than for employment or property, i.e., made gratuitously. Examples are allowances, gifts, or bequests made to family members or to companions.[1] These are obviously the category of transfers ex-

1 Transfers between family members or companions for employment or property—such as fees paid to a doctor or lawyer, wages paid to a gardener or tutor, rent paid to a landlord, or the purchase price of a

empted from income tax by section 102(a) as "property acquired by gift, bequest, devise, or inheritance."[2]

During the 75 years of our modern income tax, the Commissioner has never tried to tax gratuitous transfers within the family. That is so despite the fact that family members render services to each other that, strictly, might be treated as consideration. One family member may cook the family's meals, mend or press another member's clothes, do shopping, clean the house, wash the car, run errands, walk the dog, or baby-sit.

To give section 102(a) scope, the things family members commonly do for each other must be disregarded. Treatment of such acts and the motivating love and affection as consideration would make section 102(a) unworkable.

Professor Bittker has discussed this subject perceptively:[3]

> [I]f (a) Smith inherits $100 from his parents, (b) he gives the legacy to his wife for Christmas, (c) she uses the funds to purchase a bicycle as a birthday gift for one of their children, and (d) the donee gives the bicycle to a younger brother or sister, an outside observer might doubt that this chain of events should be treated as creating $400 of income, even though each of the participants in rotation experienced an accession to his or her wealth.[4]
>
> [I]f gifts were taxed to the recipient, it would be necessary either to draw a line between taxable gifts and tax-free

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used automobile—are outside the scope of this discussion. Payments between related parties for services rendered in a commercial setting are, of course, taxable. *See Denman v. Commissioner*, 48 T.C. 439 (1967) (minor children worked in their father's engineering business); *Tucker v. Commissioner*, T.C. Memo. 1979-449 (adult son assisted his mother in operating her grocery store).

2 Although such gratuitous transfers are exempt from income tax, they are subject to estate or gift tax unless they discharge the transferor's legal obligation to support the transferee.

3 1 B. Bittker, *Federal Taxation of Income, Estates and Gifts* 10-2 *et seq.* (1981).

4 *Id.* at 10-3.

> family support or else to require the minor children and other members of a household to report the value of the right to occupy the family residence and dine at the family table.[5]
>
> [I]f a revenue agent attempted . . . to deny an exclusion for children's allowances, it is almost certain that the courts would somehow or other bring them within the shelter of IRC § 102(a).[6]
>
> [I]ntra-family transfers of this type [a promise to pay a child's college tuition if he maintains a specified scholastic average or amounts paid by breadwinners to support their spouses and minor children] can be properly viewed as excludable by a higher authority than the language of IRC § 102(a), viz., a basic presupposition—so obvious it does not require explicit mention in the Code—that Congress never intended to tax them.[7]

Turning to payments for companionship, Professor Bittker predicts their nontaxability:

> The increased frequency and social acceptability of informal alliances make it likely that financial arrangements between consenting adults will . . . ordinarily be regarded as a sharing of resources, comparable to marital support, and that only blatant commercial traffic will be characterized as compensatory.[8]

In short, love and affection and the kind of services commonly rendered by one spouse or companion to the other are not consideration for the purpose of section 102(a).

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5 *Id.*

6 *Id.* at 10-20 (footnote omitted).

7 *Id.* at 10-21 (footnote omitted).

8 *Id.* at 10-22.

A provision of the gift tax regulations, approved by this Court in *Commissioner v. Wemyss*, page 4 *supra*, is to the same effect:

> A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.[9]

The petitioner did for Richmond, out of love and affection, what a wife, out of love and affection, does for her husband. Moreover, the relationship between Richmond and the petitioner, like that between husband and wife, was reciprocal; each enriched the life of the other.[10]

The "increased frequency" and "social acceptability" of informal alliances referred to by Bittker are buttressed by Census Bureau data. In 1960 there were fewer than 440,000 couples of opposite sex cohabiting without marriage; there were more than 2.2 million such couples in 1986.[11] This phenomenon has added "palimony" to our language and has given Lee Marvin unwanted publicity.[12]

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9 Reg. § 25.2512-8, formerly Treas. Reg. 79 (1936 ed.) Art. 8.

10 The petitioner testified at the Tax Court hearing (transcript at p. 169):

> I treated him as a husband. He treated me as a wife. And we just did the normal loving things that two people who care for each other do.

11 Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 Georgetown L.J. 1829, 1831 n. 12 (1987).

12 *See Marvin v. Marvin*, 18 Cal.3d 660, 557 P.2d 106 (1976).

II

If the deceased spouse or companion does not make the promised bequest, the disappointed survivor may, as the petitioner did here, sue the decedent's estate and recover damages.[13]

Damages are classed for income tax purposes "by reference to the origin of the claim." *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944). The question to be asked is "In lieu of what were the damages awarded?" *Id.* Briefly, damages are taxed like the thing they replace.

The decided cases well illuminate that doctrine:

1. Where the damages recovered replace lost profits from business, the recovery is ordinary income because the lost profits would have been ordinary income. *Swastika Oil & Gas Co. v. Commissioner*, 123 F.2d 382 (6th Cir. 1941). Similarly, damages awarded to an individual in lieu of interest or dividends are taxable as ordinary income. *Spangler v. Commissioner*, 323 F.2d 913 (9th Cir. 1963).

2. Where the damages recovered are for injury to good will (a capital asset), the damages are, first, a tax-free recovery of basis and, as to any excess over basis, capital gain. *State Fish Corp. v. Commissioner*, 48 T.C. 465, 472-74, *supp. op.*, 49 T.C. 13 (1967). Because the good will, if sold, would have produced basis recovery and capital gain, damages recovered for the tort are also basis recovery and capital gain.

3. Similarly, where a taxpayer was fraudulently induced to sell or exchange stock (a capital asset) and later recovered damages for the fraud, the damages are taxed as amounts received from the sale or exchange of a capital asset. *Victor E. Gidwitz Family Trust v. Commissioner*, 61 T.C. 664 (1974); *Megargel v. Commissioner*, 3 T.C. 238 (1944).

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13 Contracts between spouses to make wills, like such contracts between companions, may be enforced. *See, e.g., O'Connor v. Immele*, 77 N.D. 346, 43 N.W. 2d 649 (1950).

4. *In Tribune Publishing Co. v. United States*, 836 F.2d 1176 (9th Cir. 1988), an amount recovered in a securities fraud litigation was treated for tax purposes as though it had been received as dividend boot in the reorganization in which the securities fraud had been perpetrated. As dividend boot received by a corporate taxpayer in a reorganization, the recovery qualified for the dividends received deduction.

5. In *Clark v. Commissioner*, 40 B.T.A. 333 (1939), the taxpayer recovered damages from his lawyer, who had caused the taxpayer to overpay his federal income tax. Because federal income tax overpayments, when refunded, are not included in gross income, the damages in *Clark* were nontaxable.

In short, the tax classification of damages rests, not on the form of the action, but on the "nature of the underlying injury." *See Threlkeld v. Commissioner*, ____ F.2d ____ (6th Cir. 6/1/88, *amended*, 6/15/88) (a section 104(a)(2) decision).[14]

Under the above principles, the damages received by the disappointed spouse or companion replace the promised bequest that was not made. The damages are nontaxable because the bequest would have been nontaxable.

III

This Court has held that Congress intended, in enacting section 102(a), to "provide a uniform rule." *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938). Whether section 102(a) applies is a "federal question" not to be determined by "local characterization." *Id.* at 193.

The remedies provided by state law for a broken promise to make a will vary widely. 1 G. Palmer, *Law of Restitution* § 421 (1978); T. Atkinson, *Handbook of the Law of Wills* § 48 (2d ed. 1953). The promisee may sue for specific performance if the statute of frauds is not a defense.[15] In some states, the suit may

14 The *Threlkeld* opinion, as amended, is unofficially cited at 1988 U.S. App. LEXIS 7252.

15 In many states, the statute of frauds is not a defense where the oral promise involved personal property only.

be brought in reliance on part performance by the promisee. Some states permit imposition of a constructive trust or a lien. Other states, such as Massachusetts, permit suit in *quantum meruit* only.

The nationwide application of section 102(a) mandated by *Lyeth* requires that the various state forms of action discussed above be treated alike. The fact that the suit is in *quantum meruit* should not render section 102(a) inapplicable.

IV

The judicial precedent in this area is in disarray.

Lifetime transfers between companions have generally been held to be taxfree gifts. The leading case is *Pascarelli*, page 4 *supra*. Pascarelli transferred to his female companion large sums of money and a house. She assisted him in business "with the same spirit of cooperation that would motivate a wife to strive to help her husband advance his business." 55 T.C. at 1091. The Tax Court held that the transfers were nontaxable gifts under section 102(a). The Court of Appeals for the Third Circuit affirmed.

Other decisions of the Tax Court involving lifetime transfers between companions are consistent with *Pascarelli.*[16]

We have found no court decision on the income tax treatment of money left by will to a companion. The answer, however, may be drawn from the *Pascarelli* line of cases. The money should be taxfree under section 102(a) as a bequest.

Logically, as we have shown in Part II *supra*, damages for the deceased companion's breach of his promise to leave money by will should also be protected from tax by section 102(a). The sparse judicial precedent, however, is—surprisingly—unfavorable. *Cotnam* v. *Commissioner*, 263 F.2d 119 (5th Cir. 1959); *Hansen* v. *Commissioner*, T.C. Memo 1974-12. The *Cot-*

16 *Austin* v. *Commissioner*, T.C. Memo. 1985-22; *Libby* v. *Commissioner*, T.C. Memo. 1969-184; *Starks* v. *Commissioner*, T.C. Memo 1966-134.

nam and *Hansen* courts held that the damages were taxable as income, noting that services had been rendered.

The error in *Cotnam* and *Hansen* is in the treatment of companionship as consideration. On this point, those cases are irreconcilably at odds with *Pascarelli et al.* Moreover, they fail to apply the well-established rule for taxation of damages (*see* Part II *supra*). Finally, they ignore the admonition of this Court in *Lyeth* (*see* Part III *supra*) that section 102(a) should apply uniformly.

This Court should, for the above reasons, disapprove of *Cotnam* and *Hansen*.

V

The heart of Judge Wright's opinion below (App. 4a-6a) is seriously flawed. We accept his findings of fact (App. 2a-3a) and his statement of the issue (App. 4a), but disagree with all of his conclusions.

First, Judge Wright erred in stating that, in resolving the issue, he was "not required to investigate the relationship between petitioner and the decedent." (App. 4a.) The error in that statement is so obvious that we need not comment on it.

Second, although Judge Wright cited the leading cases on the income tax treatment of damages (App. 4a-5a), he misapplied the principle developed in those cases. *See* Part II *supra*. Judge Wright stated that "[i]f the award of damages was a substitute for income then the damages themselves are income." (App. 5a.) He failed to perceive that, here, the damages were a substitute for a nontaxable receipt (a bequest) and, therefore, themselves nontaxable.

Third, Judge Wright erred in holding that "petitioner herself characterized the nature of the claim when she sued the estate as a creditor, claiming compensation for past services rendered." (App. 5a.) Judge Wright failed to perceive (*see* Part I *supra*) that companionship is not consideration for the purposes of section 102(a).

Fourth, Judge Wright erred in holding that the petitioner's reliance on *Pascarelli*, page 4 *supra*, was misplaced. (App. 6a.) *See* Part IV *supra*. Judge Wright's holding that the petitioner had a "compensatory arrangement" with Richmond does not successfully distinguish *Pascarelli*. Surely, Judge Wright could not seriously have thought that the "sentiments of affection, respect, and admiration" that he saw in the Pascarelli relationship (App. 6a) were missing here.

In sum, Judge Wright's error stems from his failure to recognize that the petitioner's love and affection for and companionship with Richmond are not consideration in applying section 102(a).

VI

Reversal of the decision below is also necessary to protect the integrity of the federal estate tax.

Judge Wright, in his opinion below, treated the petitioner's claim against Richmond's estate as a claim for "compensation for past services rendered." (App. 5a.) Such claims are deductible from the gross estate for federal estate tax purposes. Section 2053(a)(3).

It would be curious indeed if recoveries by surviving companions were deductible as claims for estate tax purposes when recoveries by surviving spouses are not. Sections 2034, 2043(b)(1), and 2053(e) prevent deduction, as claims against the gross estate, of the value of possessed or relinquished dower, curtesy, or other marital rights of the surviving spouse. It is hard to believe that Congress intended claims asserted by a surviving companion to stand on a better footing for estate tax purposes than claims by a surviving spouse.

On this estate tax issue also, the judicial precedent is unclear. The Tax Court has denied a claimed estate tax deduction for a payment to the decedent's surviving companion in compromise of her claim that the decedent had agreed to compensate her for her companionship and attention.[17] However, the Tax Court, in

17 *Estate of Friedman v. Commissioner*, 3 TCM (CCH) 180 (1944).

taking that action held that the executor had not carried his burden of proof.[18] The Tax Court stated as dictum that, if the burden of proof had been borne, the amount paid would have been deductible.[19]

Clarification of the confusion over the estate tax treatment of recoveries by companions is needed for the purposes of estate administration. Until the estate tax treatment of payments to surviving companions is clarified, estate administration in cases involving that issue will be in turmoil.

With the top income and estate tax rates now at 28 percent and 55 percent, respectively, the decision below will deplete the revenues. To paraphrase this Court's observation regarding the gift tax in *Wemyss*, page 4 *supra*, that would "open wide the door for evasion of the . . . [estate] tax." 324 U.S. at 308.

VII

This is a challenging issue of both practical and scholarly interest. Transactions raising the issue will recur; as here, they can involve large income and estate tax liabilities. The jurisprudence is in disarray. This Court's guidance is sorely needed.

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18 *Id.*

19 *Id.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

James B. Lewis
Director, Student Tax Clinic
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0381

Counsel for Petitioner

July 7, 1988

APPENDICES

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APPENDIX A

UNITED STATES TAX COURT

T. C. Memo. 1987-503

Filed September 28, 1987.

Docket No. 13089-81.

BYRNECE S. GREEN,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Earl G. Thompson, *Alan J. Garfunkel* and *Marc S. Orlofsky*, for the petitioner.

Nancy M. Vinocur, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WRIGHT, *Judge*: Respondent determined deficiencies of \$41,709.93 and \$253,083.00 in petitioner's Federal income taxes for 1977 and 1978, respectively. The issues for consideration are: (1) whether proceeds received by petitioner in settlement of a claim against an estate are taxable as income under section 61;[1] and (2) if so, whether the attorney's fees necessary for pursuing and realizing the claim are deductible as section 212 expenses.

1 All section references refer to the Internal Revenue Code of 1954, as amended and in effect for the taxable years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by this reference.

Byrnece S. Green (hereinafter petitioner) resided in New York, New York, at the time the petition was filed. Petitioner timely filed individual Federal income tax returns with the Andover Service Center, Andover, Massachusetts, for the taxable years 1977 and 1978. On March 24, 1981, respondent issued a notice of deficiency wherein he determined that petitioner had failed to report income in the amounts of $139,311.61 and $760,688.39 for the taxable years 1977 and 1978, respectively. Petitioner had received these amounts pursuant to a settlement agreement from the estate of Maxwell E. Richmond (hereinafter referred to as decedent).

Petitioner first met the decedent on November 18, 1962, in Boston, Massachusetts. Within a few weeks petitioner had fallen in love with him. The decedent returned her affection and by late December the couple were engaged to be married. Ten months later the decedent begged to be released from the engagement, explaining that he had "a mental problem about marriage." He suggested to petitioner that they forego the legal ceremony, and that she "stay with him without marriage." In return, he promised that he would leave her "everything" when he died. Petitioner reluctantly agreed.

Petitioner characterized her relationship with the decedent as that of "an old-fashioned traditional wife." Although they always maintained separate apartments, she made his life as comfortable as possible; she watched his diet and his health, cared for him when he was ill, kept track of his appointments and concerned herself with his personal needs. She also accompanied the decedent frequently on business related trips and attended meetings and social engagements with him. They were essentially inseparable for the nine years of their relationship and traveled together in the United States and abroad. The couple celebrated the anniversary of their first date every November.

Petitioner, who was employed as a stockbroker, advised the decedent on his business affairs and kept him informed about the value and activity of his investments. Decedent owned and operated a radio station in Boston. Petitioner reported on the stock market activities at his radio station every afternoon. She went to the radio station to wait for him every evening and helped with various tasks.

Although petitioner never saw the decedent's will, he promised her that he had provided for her. After he died on October 21, 1971, no will could be found. Several months later the decedent's brother, Richard Richmond, discovered a will which left the entire estate, valued at around $7,000,000 to Richard and Dorothy, the decedent's sister.

Petitioner sued the estate for the value of services rendered to the decedent in reliance upon his promise to leave her the entire estate. The jury found for petitioner under the theory of quantum meruit and awarded her $1,350,000. The only evidence offered to show the value of the services was the inventory of the estate. She maintained that the decedent had himself valued her performance at that amount. The estate appealed the trial court's ruling. The Supreme Judicial Court of Massachusetts upheld the decision, remanding on the sole issue of the measure of damages. The court held that it was erroneous to allow the inventory of the estate as the only measure of damages. Following that decision, petitioner and the decedent's executor settled the claim for $900,000 payable over two years: $139,311.61 was paid in 1977, and $760,688.39 was paid in 1978. Consequently, petitioner withdrew her notice of claim in the probate proceeding.

Petitioner did not include these amounts in income on the returns she filed in 1977 and 1978. She did attach a statement to the return explaining why she believed the sums were not taxable. The failure to include these sums in income for taxable years 1977 and 1978 is the basis for respondent's determination of a deficiency.

OPINION

Respondent's determination of deficiencies in income tax are presumptively correct and petitioner has the burden of proving them erroneous. *Welch v. Helvering*, 290 U.S. 111 (1933); Rule 142(a). Based on the record before us, we conclude that petitioner has not met her burden of proof.

Respondent determined deficiencies in petitioner's income taxes for 1977 and in 1978 resulting from the amounts she received in settlement from the estate of Maxwell E. Richmond. Respondent maintains that the proceeds were neither a gift, bequest nor devise, but were compensation for services rendered by petitioner to the decedent between the years 1962 and 1971. Petitioner claims, on the other hand, that the services she performed were merely "wifely services" and not compensable services within the meaning of section 61. She contends that the payment was a gift or bequest from the decedent and exempt from taxation under section 102. She further maintains that the fact that she had to press her claim through litigation does not alter its essential character as a gratuitous transfer.

We are not required to investigate the relationship between petitioner and the decedent to resolve this question. We have long recognized the rule that "The taxability of the proceeds of a lawsuit, or of a sum received in settlement thereof, depends upon the nature of the claim and the actual basis of recovery." *Sager Glove Corp. v. Commissioner*, 36 T.C. 1173, 1180 (1961), affd. 311 F.2d 210 (7th Cir. 1962), cert. denied 373 U.S. 910 (1963); see also *Gidwitz Family Trust v. Commissioner*, 61 T.C. 664, 673 (1974); *State Fish Corp. v. Commissioner*, 48 T.C. 465, 472 (1967), modified by 49 T.C. 13 (1967). The nature of litigation recovery is determined by reference to the origin and character of the claim which gave rise to the litigation. *Lyeth v. Hoey*, 305 U.S. 188 (1938), *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110 (1st Cir. 1944), affg. 1 T.C. 952 (1942), cert. denied 323 U.S. 779 (1944).[2] See also

2 For example, a suit for damages in recovery for a personal injury results in tax exempt income for the claimant whether the tortfeasor pays

State Fish Corp. v. Commissioner, supra, wherein we relied heavily upon the allegations set forth in the complaint.

The proper inquiry is into the nature of the loss in lieu of which the damages were awarded. *Fono v. Commissioner*, 79 T.C. 680, 692 (1982), affd. without published opinion 749 F.2d 37 (9th Cir. 1984); *Entwicklungs & Finanzierungs A.G. v. Commissioner*, 68 T.C. 749, 759 (1977); *Henry v. Commissioner*, 62 T.C. 605 (1974). If the award of damages was a substitute for income then the damages themselves are income.

In the instant case, petitioner herself characterized the nature of the claim when she sued the estate as a creditor, claiming compensation for past services rendered. She established that the decedent had promised to provide for her through his will. She introduced evidence of the services she had performed. She proved that although she had performed what she promised, the decedent had reneged on his promises. The jury was fully instructed on the elements of recovery under the theory of quantum meruit and held for petitioner under that theory. Because the underlying claim was a suit for earned, but unpaid compensation, that claim dictates the tax treatment for the income received.[3] We therefore conclude that the settlement payment received in lieu of the damages is taxable income to her for the settlement award can go no further than the underlying claim to which it relates.[4]

Petitioner has urged upon us several alternative analytical approaches which allegedly would allow these settlement payments to be excluded from income. After reviewing these arguments, we find that neither has merit.

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damages pursuant to court order or pursuant to a private settlement agreement. Sec. 1.104-1(c), Income Tax Regs.; *Seay v. Commissioner*, 58 T.C. 32 (1972). Similarly, damages which represent a recovery of lost profits or income will be taxed as gain or income regardless of an intervening settlement. *Swastika Oil & Gas Co. v. Commissioner*, 123 F.2d 382 (6th Cir. 1941), affg. 40 B.T.A. 398 (1939), cert. denied 317 U.S. 639 (1943).

3 Gross income, as defined in section 61, includes compensation for services.

4 See *Wolfson v. Commissioner*, T.C. Memo. 1978-445.

We first address petitioner's claim that the settlement payments should be excluded from income under section 102.[5] In support of her position, petitioner relies on *Pascarelli v. Commissioner*, 55 T.C. 1082 (1971), a case wherein we held that payments in exchange for "wifely services" are not compensation within the meaning of section 61 even when the provider is not legally a wife. In the *Pascarelli* case, the taxpayer had lived as though she were a wife with the transferor who supported her.

Petitioner's reliance on *Pascarelli v. Commissioner, supra*, is misplaced. The *Pascarelli* case is factually distinguishable from the instant case because in *Pascarelli* we concluded that the lifetime transfers made to the taxpayer were gifts, specifically transfers that "were motivated by sentiments of affection, respect, and admiration," and that conclusion was supported by the testimony of the tranferor. 55 T.C. at 1091. In the case herein, however, we have determined, based on petitioner's lawsuit, that she had a compensatory arrangement with the decedent. Thus, the amounts petitioner received from the estate cannot be characterized as gratuitous transfers.

We are further asked to consider the arrangement between petitioner and the decedent as an antenuptial agreement. In an antenuptial agreement the parties agree, through private contract, on an arrangement for the disposition of their property in the event of death or separation. Frequently, in exchange for the promises of property, one party agrees to relinquish his or her marital rights in other property. Occasionally, however, the relinquishment of marital rights is not involved. These contracts are generally enforceable under state contract law. See *Marvin v. Marvin*, 18 Cal.3d 660, 557 P.2d 106 (1976). Nonetheless, transfers pursuant to an antenuptial agreement are generally treated as gifts between the parties, because under the gift tax law the exchanged promises are not supported by full and adequate consideration, in money or money's worth. *Commissioner v. Wemyss*, 324 U.S. 303 (1945); *Merrill v. Fahs*, 324 U.S. 308 (1945).

Despite initial appeal, we find that this analogy is inapposite. While an exchange of promises was involved in the agreement

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5 Section 102 excludes from income "the value of property acquired by gift, bequest, devise or inheritance."

between petitioner and decedent, there was no contract. In the Massachusetts litigation petitioner was awarded damages under a theory of quantum meruit. The jury was fully instructed on a contract theory of recovery but rejected it. Without a contract there can be no antenuptial agreement. A mere exchange of promises falls short of being an antenuptial agreement. Moreover, it is consistent with petitioner's theory in her litigation with decedent's estate that such exchange of promises be viewed as an arrangement for services to be rendered.

Accordingly, after a careful analysis of all the facts and circumstances we hold that the payments petitioner received in settlement of her claim against the estate of Maxwell E. Richmond constitute taxable income to her in the amounts of $139,311.61 and $760,688.39 during the years 1977 and 1978, respectively. The parties have stipulated that if the payments are deemed to be taxable income, the legal expenses incurred by petitioner are deductible under section 212. Furthermore, the parties agreed that those expenses equalled $52,172.19 in 1977 and $253,562.74 in 1978.

To reflect the foregoing,

Decision will be entered under Rule 155.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 13089-81

BYRNECE S. GREEN,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

For cause, it is

ORDERED that the Court's Memorandum Findings of Fact and Opinion filed September 28, 1987 (T.C. Memo. 1987-503) is hereby amended as follows:

On page 10, delete the last two lines and substitute in lieu thereof:

"*Decision will be entered for the respondent.*"

/s/ LAWRENCE A. WRIGHT
Lawrence A. Wright
Judge

Dated: Washington, D.C.
October 7, 1987

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 13089-81

BYRNECE S. GREEN,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Findings of Fact and Opinion filed September 28, 1987 (T.C. Memo. 1987-503), it is

ORDERED and DECIDED that there are deficiencies in income tax due from petitioner for the taxable years 1977 and 1978 in the amounts of $41,709.93 and $253,083.00, respectively.

/s/ LAWRENCE A. WRIGHT
Lawrence A. Wright
Judge

Entered: October 22, 1987

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1028—August Term 1987

(Argued April 27, 1988 Decided May 16, 1988)

Docket No. 88-4015

BYRNECE S. GREEN,

Petitioner-Appellant,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before:

CARDAMONE, PRATT, and MAHONEY,
Circuit Judges.

Byrnece Green appeals from a decision of the United States Tax Court (Wright, J.) entered October 22, 1987 determining deficiencies in income tax due. *Green v. Commissioner of Internal Revenue*, 54 T.C.M. (CCH) 764 (1987). Appellant claims that money she received in settlement of a claim against an estate is not taxable as income

under Section 61(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 61(a) (1982), but is excludable under Section 102(a), 26 U.S.C. § 102(a) (1982).

Affirmed.

JAMES B. LEWIS, Benjamin N. Cardozo School of Law, New York, New York, *for Appellant.*

NANCY G. MORGAN, Washington, D.C. (William S. Rose, Jr., Assistant Attorney General, Gary R. Allen, Gilbert S. Rothenberg, Mary Frances Clark, Tax Division, Department of Justice, Washington, D.C., of counsel), *for Appellee.*

PER CURIAM:

Byrnece Green appeals from a decision and order of the United States Tax Court (Wright, J.) entered October 22, 1987 that determined deficiencies of $41,709.93 and $253,083.00 in income tax due from her for the tax years 1977 and 1978, respectively.

The facts are not in dispute. Byrnece Green met Maxwell Richmond on November 18, 1962. Ms. Green, then 36 years old, was a divorced secretary who lived in Boston with her 15-year old son. Richmond was a wealthy, 49-year old bachelor, whose holdings included licenses to operate three radio stations. After meeting Richmond, Green became a stockbroker earning approximately $20,000 a

year. About a month after their initial meeting, Richmond proposed marriage and Green accepted. Wedding plans were announced to their families and friends. In October 1963 Richmond told Green that he had a "mental hangup" about marriage, and she agreed to live with him without benefit of matrimony. In return, according to Green and others, Richmond orally agreed to bequeath his estate to her.

Commencing in October 1963 the couple maintained a close relationship for the ensuing eight-year period. Ms. Green performed "social," "domestic," and "business" services for Richmond, including caring for him, shopping, running errands, and entertaining his friends and business associates. They vacationed and attended family functions together. Although maintaining separate apartments, they had an intimate marriage-like relationship. Green's only purely business services were providing investment updates to Richmond and speaking briefly at his radio station about financial matters. Richmond died in Green's arms of a heart attack on October 21, 1971.

After Richmond's death no will was immediately found. Later, in a hotly disputed legal proceeding, a one-page paper allegedly signed by Richmond was admitted to probate as Richmond's will. The paper left Richmond's entire estate to his siblings and named his brother as executor. The gross value of the estate exceeded $7 million. Ms. Green sued Richmond's estate in the Massachusetts Superior Court for Suffolk County. Under Massachusetts law an oral promise to make a will is not binding. However, if the decedent had made an oral agreement with Ms. Green, she could recover the fair value of her services. On her claim in *quantum meruit* the jury awarded Green $1,350,000 for services rendered.

Richmond's executor appealed to the Supreme Judicial Court of Massachusetts, which affirmed as to liability but reversed and remanded the case for a new trial limited to the issue of damages. *Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975). Following remand, Green accepted $900,000 in full settlement of her suit pursuant to a written agreement with the estate's executor, payable $139,311.61 in 1977 and $760,688.39 in 1978. It is these payments that form the subject matter of this appeal.

Green disclosed the payments to the Commissioner of Internal Revenue on her 1977 and 1978 tax returns, but asserted that they were excludable from her income for those years. On audit, the Commissioner included these amounts in income. In its October 22, 1987 published opinion the Tax Court sustained the Commissioner's action reasoning that the settlement income was taxable as income for services rendered, and was not money received by gift, bequest, devise, or inheritance. The Tax Court further noted that the parties had stipulated that if the payments are held to be taxable income, petitioner's legal expenses are deductible. *See* 54 T.C.M. (CCH) 764 (1987).

Thus, the disputed issue before us is whether money received by the appellant Green in settlement of her claim against Richmond's estate for services rendered to the decedent is taxable as income under section 61(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 61(a), or excludable under section 102(a), 26 U.S.C. § 102(a), as money "acquired by gift, bequest, devise, or inheritance." Appellant Green claims exclusion under § 102(a). The Commissioner asserts a tax is due under § 61(a). The Tax Court held for the appellee. We affirm substantially for the reasons stated in Judge Wright's careful opinion.

Order affirmed.

APPENDIX C

SEC. 61. GROSS INCOME DEFINED.

(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(b) CROSS REFERENCES.—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

SEC. 102. GIFTS AND INHERITANCES.

(a) GENERAL RULE.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) INCOME.—Subsection (a) shall not exclude from gross income—

(1) the income from any property referred to in subsection (a); or

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

Where, under the terms of the gift, bequest, devise, or inheritance, the payment, crediting, or distribution thereof is to be made at intervals, then, to the extent that it is paid or credited or to be distributed out of income from property, it shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property. Any amount included in the gross income of a beneficiary under subchapter J shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property.

APPENDIX D

SUPREME JUDICIAL COURT
OF MASSACHUSETTS,
SUFFOLK.

Argued April 11, 1975. Decided Nov. 10, 1975.

Bernyce GREEN

v.

Richard J. RICHMOND, executor.

James D. St. Clair, Boston (William Lender, Boston, and Kevin P. Curry with him), for defendant.

Francis J. DiMento, Boston (Thomas C. Cameron, Boston, with him), for plaintiff.

Before

TAURO, C. J., and BRAUCHER, HENNESSEY, KAPLAN and WILKINS, JJ.

HENNESSEY, Justice.

This is an appeal by the defendant from a judgment rendered against him as the personal representative of the estate of Maxwell Evans Richmond (the decedent). The action was in the nature of quantum meruit and sought recovery for services rendered by the plaintiff in reliance on the decedent's oral promise to leave a will bequeathing his entire estate to her.

A jury trial in the Superior Court resulted in a verdict for the plaintiff in the amount of $1,350,000. The defendant saved exceptions to the denial of his motion for a directed verdict, as

well as to the admission of certain evidence, to portions of the instructions as given and to the refusal to instruct as requested; additionally, he appealed from the denial of his motion for a new trial. Subsequently, this court granted a request for direct appellate review.

The defendant does not now argue that the judge's instructions to the jury were erroneous. Rather, he argues that there was error in the admission in evidence of the probate inventory of the decedent's estate on the issue of damages. He also argues that a verdict should have been directed in his favor (1) because the contract was illegal, and (2) because, had the inventory been excluded from evidence, there would have been no evidence on the issue of damages. Finally, the defendant argues that it was error to deny his motion for a new trial because of excessive damages.

We conclude that the defendant's motion for a directed verdict was properly denied but that there must be a new trial, on the issue of damages only, because of error in allowing in evidence the probate inventory of the decedent's estate.

The facts are as follows: The plaintiff testified that she met the decedent in November, 1962, and shortly thereafter accepted his proposal of marriage. She was thirty-six years of age at the time, divorced, and had a fifteen-year old son; she was then employed as a secretary. The decedent was a wealthy, forty-nine year old bachelor whose holdings included licenses to operate three radio stations. Later the plaintiff became a stockbroker, earning about $20,000 a year.

About a year after they met, in October, 1963, the decedent stated that he had a "mental hangup" about marriage and asked to be released from the engagement; he said, however, that if the plaintiff would agree to "stay" with him, he would bequeath his entire estate to her at his death. The plaintiff agreed. There was other evidence directly corroborating the agreement. During the eight-year period between October, 1963, when the bargain was made, and October, 1971, when the decedent died, there was evidence that the decedent, on several occasions, made statements to the plaintiff and other persons which could be found to be an acknowledgment by him of the

original agreement. The last such occasion was on July 26, 1971, about three months before his death.

There was also evidence from which it could be found that the plaintiff kept her part of the agreement in reliance on the decedent's promise. There was detailed evidence of many services, of a social and domestic as well as of a business nature, performed by the plaintiff for the decedent over the eight-year period. There was evidence of many instances of sexual intercourse between the plaintiff and the decedent. The decedent died in October, 1971. The inventory value of his estate, which the judge permitted to be shown in evidence, was approximately $7,232,000.

1. It is clear that the oral agreement involved a promise to make a will, and as such was not binding. G.L. c. 259, § 5. Nevertheless, if the oral agreement were legal and not contrary to public policy, the plaintiff could recover the fair value of her services. *Draper v. Turner*, 339 Mass. 616, 619, 162 N.E.2d 49 (1959); *Heil v. McCann*, 360 Mass. 507, 511, 275 N.E.2d 889 (1971).

We consider first the defendant's argument that a verdict should have been directed in his favor on the ground that the contract was illegal. The argument offered is that as matter of law the agreement included sexual intercourse or cohabitation as part of the consideration, and that such a contract will not be enforced as against public policy. See G.L. c. 272, §§ 16, 18, as to criminality; *Otis v. Freeman*, 199 Mass. 160, 85 N.E. 168 (1908); *Zytka v. Dmochowski*, 302 Mass. 63, 65, 18 N.E.2d 332 (1938); Restatement: Contracts, § 598 (1932 and Supp.1935). Further, the argument is that even if the agreement did not expressly include illicit terms, the unlawful performance of the bargain precludes recovery. *Tocci v. Lembo*, 325 Mass. 707, 710, 92 N.E.2d 254 (1950).[1]

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1 In the *Tocci* case at 710, 92 N.E.2d at 256, we quoted from Williston, Contracts, § 1761 (Rev. ed. 1938): " '. . . if the performance actually rendered by the plaintiff is something in itself forbidden by law, the fact that

We conclude that there was no error in the denial of a directed verdict because these issues were properly submitted to the jury under appropriate instructions, and the jury obviously reached conclusions favorable to the plaintiff.[2]

The defendant relies on several rules of law, which we state for purposes of analysis. Those rules are as follows. Where there is no conflicting evidence as to the terms of an oral contract, the construction of those terms is a matter of law for the judge rather than the jury. *Bogash v. Studios, Inc.*, 303 Mass. 207, 208, 21 N.E. 2d 235 (1939); *Hiller v. Submarine Signal Co.*, 325 Mass. 546, 549-550, 91 N.E.2d 667 (1950). Thus, where the terms of the contract are not disputed, whether that contract is void as in contravention of public policy or otherwise illegal or in violation of law is a question of law for determination by the judge. *Adams v. East Boston Co.*, 236 Mass. 121, 127, 127 N.E. 628 (1920); *Reuter v. Ballard*, 267 Mass. 557, 562-563, 166 N.E. 822 (1929). A party's admissions in testimony at the trial are binding on the party in the absence of other evidence more favorable to the party. *Murphy v. Smith*, 307 Mass. 64, 66, 29 N.E.2d 726 (1940); *Perry v. Hanover*, 314 Mass. 167, 170, 50 N.E.2d 41 (1943). Massachusetts law will not enforce, even indirectly through an action in quantum meruit, a contract to commit a crime. *Otis v. Freeman*, 199 Mass. 160, 85 N.E. 168 (1908); *Zytka v. Dmochowski*, 302 Mass. 63, 65, 18 N.E.2d 332 (1938), Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted. *French v. McAnarney*, 290 Mass. 544, 546, 195 N.E.

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the bargain was in such general terms as to cover either the illegal performance or a lawful performance, and that both parties originally had no intention to have the performance unlawful, will surely not justify recovery on the bargain if the illegality is serious or more than an incidental part of the performance. . . . Not the illegality of the contract, but the illegality of the plaintiff's conduct either in entering into or in performing the contract is the true ground for denying recovery.' "

2 It could persuasively be argued that only naive persons would conclude that sexual intercourse was not central to the arrangement between the parties. Nevertheless that reasoning is not relevant, since the evidence as summarized, *infra*, warranted the submission of the issues to the jury.

714 (1935). *Cf. Commonwealth v. Munson*, 127 Mass. 459 (1879); *Boltz v. Boltz*, 325 Mass. 726, 92 N.E.2d 365 (1950). Even if, at the time of contracting, the parties to a contract did not mean the services to be rendered to include illegal conduct, there can be no recovery if the performance was in fact illegal, and the illegality was serious and not merely an incidental part of the performance of the agreement. *Tocci v. Lembo*, 325 Mass. 707, 92 N.E.2d 254 (1950); *Hawes Elec. Co. v. Angell*, 332 Mass. 190, 191-192, 124 N.E.2d 257 (1955). The question whether the illegality was serious or more than an incidental part of the performance has been held in some cases to be an issue of law which should not be left to the jury. *Woodbury v. Sparrell Print*, 198 Mass. 1, 9, 84 N.E. 441 (1908); *Hawes Elec. Co. v. Angell, supra*, 332 Mass. at 192, 124 N.E.2d 257; *Buccella v. Schuster*, 340 Mass. 323, 325, 164 N.E.2d 141 (1960).

Applying these principles to the instant case, the defendant argues that sexual intercourse was within the scope of the agreement and that the plaintiff therefore can recover nothing for her services; that additionally, or in the alternative, the plaintiff's performance in an illegal manner, by indulging in sexual intercourse, entitles her to no compensation, since her illegal performance was serious and not merely incidental to the agreement; that the illegality of the agreement and the illegality of the performance thereof were established as matter of law by the plaintiff's admissions on the witness stand at the trial, which the defendant argues were binding on her since there was no other evidence more favorable to her as to these issues; and that a directed verdict for the defendant was therefore required.

The plaintiff argues that public policy does not forbid her recovery in this case. For this proposition, she cites *Silver v. Graves*, 210 Mass. 26, 30, 95 N.E. 948 (1911); *Hiram Ricker & Sons v. Students Intl. Meditation Soc.*, 501 F.2d 550, 556 (1st Cir. 1974), and *Buccella v. Schuster*, 340 Mass. 323, 326, 164 N.E.2d 141 (1960). She particularly relies on *Commonwealth v. Balthazar*, ____ Mass. ____, 318 N.E.2d 478[a] (1974). The further issue arises, as emphasized by the defendant, whether the

a. Mass.Adv.Sh. (1974) 2001.

latter case is apposite as to public policy considerations where (as argued here) the sexual relationship is asserted to be a matter of contract. We need not reach this issue because of our conclusion as reasoned below that the question as to whether illegality was an inherent part of the agreement was a question of fact for the jury's determination.

The judge, in denying the defendant's motion for a directed verdict, submitted to the jury the issue of illegality, both as to the content of the agreement and the nature of the plaintiff's performance. There was no error. We accept, at least for analytical purposes, the rules of law relied on by the defendant. Nevertheless, applying those principles in this case, we do not reach the result urged by the defendant because the evidence was not uncontroverted as to these issues, and, as stated by the defendant, construction of the contract terms is for the court rather than the jury "[w]here there is *no* conflicting evidence as to . . . those terms" (emphasis supplied). Where the evidence is disputed as to the terms or performance of an oral agreement, or the meaning of words used by the parties, the matter should be left to the jury. *Rizzo v. Cunningham*, 303 Mass. 16, 20-21, 20 N.E.2d 471 (1939). In this case there was disputed evidence, some of which was sufficiently favorable to the plaintiff to warrant submission of the issues to the jury.

Thus, the plaintiff's testimony as to the terms of the contract contained no reference to sexual intercourse as follows, viz.; "He said he couldn't lose me, either, and then he said, 'I have been thinking about something, and I want you to listen to me.' He said: 'I have been looking for you all my life. You're the perfect woman for me.' He said: 'If you will agree to stay with me without marriage, you will be happy. I will see that your life will be happy. There's only one thing you won't have. You won't have the emotional security a woman has when she knows she is married, but I will make it up to you. I am going to make my will out right away. Everything I have when I die will be yours. I owe nothing to anyone else.' "

The defendant contends, however, that other evidence particularly admissions by the plaintiff, required a conclusion that the contract included an agreement for sexual intercourse. The plaintiff had testified of many instances of sexual relations with

the decedent. However, on this issue as well as on the related issue of illegality of performance, there was other evidence, including other testimony from the plaintiff, which was more favorable to the plaintiff. Therefore the issue was for the jury's consideration. From the totality of the evidence the jury were warranted in inferring that the illicit relations were no part of the contract, and were no more than an incidental part of the plaintiff's performance.

Thus, inferences favorable to the plaintiff were supported by the evidence. For example, the plaintiff testified that, throughout their relationship, she maintained her own apartment and paid all her own household bills; that the decedent bought her no expensive gifts, furs, cars, jewelry or diamonds and made no contribution to her son's tuition at college; that she did not even accompany him on his annual vacations, customarily taken at Christmastime, until 1966 or 1967, because she felt that she owed it to her son to be home with him during his Christmas vacations from school; and that the decedent, with the plaintiff's knowledge, took another woman with him when the plaintiff could not accompany him on his annual vacation.

Further, the witness Norman Solomon, who shared the decedent's apartment, testified that he never saw the plaintiff or any trace of her at the former residences of the decedent and that the decedent slept in his own apartment every night. The witness recalled only one time when he saw the plaintiff at the decedent's last residence. Solomon further testified that the decedent "traveled a lot with . . . [a certain woman]," both before and after 1962, and "they made many trips together." Solomon quoted the plaintiff as saying, on one occasion, that both she and the decedent were free to "see" whomever of the opposite sex they might want to see.

A female witness, the "certain woman" referred to, *supra*, called by the defendant, testified that she took trips with the decedent each year between 1954 and 1958, inclusive. During the summer of 1963, she stayed at the decedent's apartment for about ten days. In 1964, she went on a trip to Jamaica with the decedent. In 1965, she went to St. Thomas and Puerto Rico with him. In 1967, she spent a week in Bermuda with him and then spent the entire summer at his apartment in Boston. Over

the 1968 New Year's holiday, she went on a thirteen-day cruise with the decedent and, later in that year, went to St. Thomas with him. In 1969, she spent about a week with him at his summer residence in Marblehead and, in November of that year, the two of them went together to Florida for a week.

From all of this evidence the jury were justified in concluding that the sexual aspect of the relationship between the plaintiff and the decedent was no part of the bargain between the two, and no more than incidental to their relationship.

The defendant also argues that if the inventory of the probate estate had been excluded from evidence, as the defendant contends that it should have been, there would have been no evidence before the jury as to the value of the plaintiff's services. For this additional reason, the defendant says, there should have been a directed verdict for the defendant. There is no merit to this contention. Of the many and varied services as to which the plaintiff presented evidence, at least some of them were of such a routine and ordinary nature as to make their fair value a matter of common knowledge for the jury's consideration. See e. g., *Mason v. Black*, 341 Mass. 347, 349, 169 N.E.2d 899 (1960).

It follows from all that we have said that there was no error in the judge's denial of the defendant's motion for a directed verdict.

2. We turn now to the second issue argued by the defendant, viz.: that it was error to admit in evidence, over the objection and exception of the defendant, the Probate Court inventory showing the value of the estate. Actually there are two related questions raised here: (1) whether evidence as to the value of the estate is admissible and (2) if such evidence is admissible whether the probate inventory is an appropriate form of proof.

We consider first the question of the admissibility of the value of the estate. There is a divergence of opinion in other jurisdictions on the issue whether evidence of the contract terms, including value bargained for, shall be admitted as evidence of the value of the services sought by an action in quantum meruit. This divergence also exists with respect to the narrower question before us, i. e., whether the value of the decedent's estate was

properly admitted as evidence of the value of the services rendered by the plaintiff on the basis that the value of the estate is the "price" put on the services by one of the contracting parties. There is precedent in somewhat similar Massachusetts cases for the admission of such evidence (see, e. g., *Downey v. Union Trust Co.,* 312 Mass. 405, 413-414, 45 N.E.2d 373 [1942]; *Turner v. White*, 329 Mass. 549, 555, 109 N.E.2d 155 [1952]) and the judge here undoubtedly relied on those decisions in making his rulings. We conclude that those decisions are controlling in the instant case and that the value of the estate was admissible in evidence.

There is substantial authority both judicial and scholarly which favors admissibility. Professor Corbin is emphatic as to the admissibility of this evidence: "No one doubts, however, that the contract price or rate agreed upon by the parties is admissible in evidence to show what is the reasonable value of the performance that the defendant has received." Corbin, Contracts, § 1113 (1964). The annotation in 21 A.L.R.3d 9, 18 (1968) is further supportive of admissibility, noting that there is "considerable authority" for admitting the contract price terms as evidence of the value of the services, under the theory that it is an admission against interest and is evidence of the general making and performance of the contract. The annotation further cites authority for admitting the contract price terms although the contract is not enforceable as violative of the statute of frauds, in cases where the promise, as here, is to transfer an estate in consideration of services, and concludes that many courts have admitted the value of the estate in these cases. See § 9[h] at pp. 44-54. See, e.g., *Burns v. Kieley's Estate*, 242 Mich. 668, 219 N.W. 743 (1928); *Norton v. McLelland*, 208 N.C. 137, 179 S.E. 443 (1935); *Richter v. Derby*, 135 Or. 400, 295 P. 457 (1931); *Cochran v. Bise*, 197 Va. 483, 90 S.E.2d 178 (1955).

On the other hand, some courts have held that such evidence should be excluded. *Quirk v. Bank of Commerce & Trust Co.* 244 F. 682, 688 (6th Cir. 1917); *Grant v. Grant*, 63 Conn. 530, 543, 29 A. 15 (1893); *Wallace v. Long*, 105 Ind. 522, 532, 5 N.E. 666 (1886); *Lemire v. Haley*, 92 N.H. 358, 361, 31 A.2d 62 (1943); *Lisk v. Sherman*, 25 Barb.S.C. 433, 439 (N.Y.Supr.Ct.

1857); *Hertzog v. Hertzog's Admr.*, 34 Pa. 418, 437 (1859). Thus it has been said that in cases such as the instant one, where the promised value was not shown to be known to both parties, and where the duration of the services was probably substantially shorter than the decedent contemplated, such evidence is of no probative force in ascertaining the reasonable value of the service. *Quirk v. Bank of Commerce & Trust Co., supra*, at 688. Also it has been held that in cases like the instant one the relationship of this evidence to the decedent's opinion as to the value of the services rendered is speculative at best, for it is at least as probable as not that the decedent regarded the leaving of everything he had to the plaintiff as a gift rather than a recompense. *Lemire v. Haley*, 92 N.H. 358, 360-361, 31 A.2d 62 (1943).

Subscribing to the reasoning of some of these cases, the defendant seeks to distinguish *Turner v. White, supra*, and *Downey v. Union Trust Co., supra*, on the basis that in the instant case the evidence of the value of the estate, due to unique factors, has no probative value as to the value of the plaintiff's services, while this was not true in the *Turner* and *Downey* cases. In those cases, the defendant submits, the evidence of the value of the estate was sufficiently probative of the reasonable value of the plaintiff's services, or more specifically the decedent's opinion as to that value, in that (1) the promised value in both cases was known to both parties or, at least, easily determinable; (2) the promised value did not fluctuate over the period of plaintiff's performance or, if it did, the fluctuation favored the defendant; and (3) the actual performance rendered probably reached what both parties originally considered would be the duration of the performance.

The plaintiff emphasizes that this court is among those that have held that it was proper to admit evidence of the value of the promised legacy or devise, citing the *Turner* and *Downey* cases. In the *Downey* case it was said: "The plaintiff is not suing for damages for a breach of the oral contract, and the value of the annuity is not the measure of damages. . . . But the value of the annuity which the testator promised to give as the consideration for the services could be shown in evidence as an

admission of what the testator considered the services worth." 312 Mass. at 413-414, 45 N.E.2d at 378 (1942).

We are not persuaded that we should distinguish the instant case from the *Turner* and *Downey* cases. It is not at all clear that the instant case differs significantly in its facts from the two prior cases, as to the three aspects emphasized by the defendant, and some weight is to be given to the fact that in those cases as in this one the decedent continued knowingly to accept the services of the plaintiff up to the time of the decedent's death. Indeed, there was evidence that the decedent in the instant case reaffirmed his promise just three months before his death.

We conclude that in the instant case appropriate proof of the value of the decedent's estate was admissible in evidence, and should be admitted at any subsequent retrial of the case.[3] Much of the reasoning advanced in favor of a directed verdict should receive consideration by the judge as substance for cautionary instructions to the jury against misuse of the evidence.

3. We turn now to a consideration of whether the probate inventory was an appropriate form of proof of the value of the estate, and whether, if it was not, it was error to admit the inventory in evidence in this case. We conclude that it was error.

The asset value was shown on the inventory as approximately $7,232,000. We have no way of knowing whether this amount accurately, or even remotely, represents the net value of the estate. We take notice that taxes, debts and other appropriate charges will substantially reduce this gross value. We assume that the inventory amount shown had some basis in fact, but the value of an estate is not shown by a list of its assets alone.

As a general rule the parties to an action have a right to show all material facts, however great the prejudice aroused by their narration. *Godfrey v. Old Colony St. Ry.*, 223 Mass. 419, 422, 111 N.E. 878 (1916). "[E]vidence admissible for one purpose, if

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3 An interesting issue has been suggested: As of what date should the value of the estate be shown? Is it the date of the agreement or the date of the death? In the instant case the issue is not pressed, presumably because there was evidence that the decedent renewed his promise just a few months before his death.

offered for that purpose in good faith, is not made inadmissible by the fact that it could not be used for another with regard to which it has a tendency to influence the mind." *Whipple v. Rich*, 180 Mass. 477, 479, 63 N.E. 5, 6 (1902). In determining whether the evidence offered serves any valid purpose we apply the rule that it must merely render the desired inference more probable than it would be without the evidence. See McCormick, Evidence, § 185, p. 437 (2d ed. 1972); *Crowe v. Ward*, 363 Mass. 85, 89, 292 N.E.2d 716 (1973). We are influenced by the general view that relevant evidence should be admitted unless there is a quite satisfactory reason for excluding it. *Crowe v. Ward, supra*. Compare Federal Rules of Evidence, Rules 401-403, U.S.C. (Supp., 1975)[b] (as enacted by P.L. 93-595, January 2, 1975, effective July 1, 1975).

Considering all of these principles, it is not quite accurate to say that the admissibility of evidence, if it is relevant for at least one purpose, ordinarily rests in the discretion of the judge. *Howe v. Boston*, 311 Mass. 278, 282, 41 N.E.2d 1 (1942). On the contrary, in the great majority of instances the offering party may be entitled to the evidence as a matter of right. Of course, it is possible that the evidential value may be so overwhelmed by the prejudicial effect as to make it advisable to exclude the evidence. *Commonwealth v. D'Agostino*, 344 Mass. 276, 279, 182 N.E.2d 133 (1962), cert. den. 371 U.S. 852, 83 S.Ct. 90, 9 L.Ed.2d 86 (1962); *Commonwealth v. Chalifoux*, 362 Mass. 811, 817, 291 N.E.2d 635 (1973). Compare Federal Rules of Evidence, Rule 403, U.S.C. (Supp. 1975)[c] (as enacted by P.L. 93-595, January 2, 1975, effective July 1, 1975). In such an instance the question of admissibility is to be determined in the sound discretion of the judge. *Horowitz v. Bokron*, 337 Mass. 739, 742, 151 N.E.2d 480, 483 (1958); *Commonwealth v. D'Agostino, supra*, 344 Mass. at 279, 182 N.E.2d 133.

There is one further principle that we consider peculiarly applicable to the extraordinary circumstances of this case,[4] viz.:

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b. (January 14, 1975) 43 U.S.L.Week 137, 138-139.

c. (January 14, 1975) 43 U.S.L.Week 137, 139.

4 The fact that the disputed inventory shows the amount of more than $7,000,000 makes the circumstances "extraordinary," in our view.

"A trial judge should ascertain by suitable preliminary inquiry, before admitting such evidence, at least that it is sufficiently verified, that it reflects the situation fairly, and that it is likely to be of sufficient assistance to the jury to warrant its use." *Horowitz v. Bokron, supra.* No such preliminary inquiry was accomplished here. In this case we have held that the value of the estate is relevant, while at the same time we have recognized the great potentiality for unfair prejudice even if the value of the estate were accurately shown. The likelihood of irremediable unfair prejudice would be greatly increased if the value of the estate were substantially overstated. We do not denigrate from the principles stated above which generally favor the admissibility of evidence. Nevertheless, in the special circumstances of this case we conclude that a preliminary showing of reliability was required before the amount of the inventory, which may or may not have been reflective of the value of the estate, was disclosed to the jury. While in most cases the requirements of fairness would be met by the fact that the defendant had the opportunity to present rebuttal evidence, we believe that is not the case here.

A majority of the court concurs in the reasoning in part three of this opinion and in the decision to grant a new trial in this case.

4. The question remains whether the new trial of this case should be as to all issues, or merely as to the issue of damages. The error here affected only the damages aspect and was not concerned with the liability issue. "The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown." *Simmons v. Fish*, 210 Mass. 563, 568, 97 N.E. 102, 104 (1912). See, generally, *New England Bldg. Trust v. Montaup Elec. Co.*, 353 Mass. 242, 244, 230 N.E.2d 644 (1967); *Kaye v. Newhall*, 360 Mass. 701, 704, 277 N.E.2d 697 (1972). We conclude, therefore, that the judgment should be reversed and the case remanded to the Superior Court for a new trial limited to the issue of damages.

So ordered.

(2)

No. 88-65

In the

SUPREME COURT OF THE UNITED STATES
October Term, 1988

BYRNECE S. GREEN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James B. Lewis
Director, Student Tax Clinic
Benjamin N. Cardozo
School of Law
55 Fifth Avenue
New York, NY 10003
Tel. No. (212) 790-0381

Counsel for Petitioner

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In the
SUPREME COURT OF THE UNITED STATES
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BYRNECE S. GREEN,

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Tax Court's decision in *Getty v. Commissioner*, 91 T.C. No. 16, issued on July 27, 1988, lends additional support to the granting of the Writ of Certiorari sought by the above-named Petitioner.

The taxpayer in *Getty* was Jean Ronald Getty ("Ronald"), one of the four surviving sons of J. Paul Getty ("Paul"). Paul had created a trust in 1934. At his death that trust held a controlling interest in Getty Oil Company and produced income of millions of dollars per year. Only $3,000 per year of that income was allocated to Ronald; the balance was allocated to his brothers.

Paul had allegedly promised Ronald that he would equalize the trust income allocation, but he died without having done so. Ronald sued the trustees and other beneficiaries of the trust and Paul's residuary legatee, and recovered in settlement $10 million.

The Tax Court said that the $10 million would have been excludable from Ronald's gross income if it had been received in lieu of

an outright bequest. However, because it was received in lieu of an income interest in a trust, the $10 million was includable in Ronald's gross income (citing IRC § 102(b)). "The origin, goal, and measure of ... [Ronald's] claim," said the Tax Court, "was income."

In contrast, the "origin, goal, and measure" of the Petitioner's claim was a promised outright bequest of property, rather than of an income interest. The Petitioner's receipt was, therefore, nontaxable.

James B. Lewis
Director, Student Tax Clinic
Benjamin N. Cardozo
School of Law
55 Fifth Avenue
New York, New York 10003
Tel. No. (212) 790-0381

Counsel for Petitioner

Dated: August 19, 1988